WAIVER OF APPEAL.

A PARTY losing his case usually wants the action of the trial court reviewed, and its adverse decision vacated by the appellate court. Owing to imperfections in the law of procedure, a perplexing situation frequently arises: How far can the prospective appellant obey the mandate of the judgment against him, without affecting his right to prosecute an appeal from it?

There is considerable conflict in the decisions, both in civil and criminal cases, but much of the seeming contradiction disappears when the controlling principle is considered, and it becomes plain that the differences of opinion are mainly as to the application of the principle.

To make this clear, let us "state the case." When a person has two courses of action open to him, he must choose one and must abide by his choice. Election (or choice) once made cannot be revoked or changed. Consistency is a precious jewel in law as well as in life. When one of the two inconsistent courses is adopted, the other is waived. Election always involves a waiver. Without a waiver, there is no election. The converse proposition, that there can be no waiver without an election, is generally true also. This is simple and elementary. It is also elementary legal truth that an act which is the result of force or duress cannot constitute a binding election or waiver. It is a legal, as well as logical impossibility to *compel* one to *choose* a particular course. It is not so much the failure to recognize these axioms, as the failure to apply them correctly, which has produced unsound decisions and confusion in this part of the law.

It may be stated as a general rule, holding good in both civil and criminal cases, that the losing party who *voluntarily* performs, pays or discharges the judgment against himself, thereby precludes himself from prosecuting an appeal from that judgment. The word "voluntarily" is emphasized, because, whether

a man by performance renounces his right of appeal depends altogether upon whether his action is voluntary or compulsory.

Suppose a defendant is adjudged to pay money to the plaintiff; can he pay, and yet appeal? Some courts hold that there can be no appeal from a judgment satisfied by the would-be appellant. The greater number of decisions, however, are to the contrary. It is held that the defendant, being liable to have his property levied on to satisfy the judgment, is therefore subject to a duress of goods, which deprives him of that freedom which is essential to choice. And it is not necessary for the defendant to await the issuance of an execution before paying the judgment, as a condition of saving his right of appeal. In such a case, payment of the judgment is, in a large sense, compulsory, and if the judgment is reversed on appeal, the defendant recovers his money.[1] The authorities cited below will give a good start to any one who desires to pursue the inquiry as to the application of the principle in civil cases.

Passing to the sphere of criminal cases, we again find conflict of judicial opinion. This conflict is not due to any intrinsic difficulty in the subject, but results chiefly from differing conceptions of the meaning of the term "voluntary." But even so, there is little excuse for the contrary views found in the decisions. The test is simple. If the defendant voluntarily acquiesces in the judgment of conviction, he cannot appeal from it; but if he is forced to perform the sentence, or pays a fine in order to escape the harsher alternative of imprisonment, his action is not to be deemed voluntary, and he may appeal from the judgment. The latter proposition, as to paying fine, is one on which the decisions differ. It also is one of special interest to the young practitioner, whose first efforts are frequently in police court cases, or cases in other courts in which the punishment is a fine with alternative imprisonment. But this is also of practical importance to the older practitioner, who is liable to find himself in a quandary, with a client "unjustly" convicted and the jail bars staring him in the face.

[1] Note to State *v.* Conkling, 54 Kan. 108, 37 Pac. 992, 45 Am. St. Rep. 270; Johnson *v.* State, 172 Ala. 424, 55 South. 226.

In a Georgia case,[2] it was held that a defendant who has paid a fine imposed by a police court, with the alternative of imprisonment, cannot, after paying such fine, prosecute a writ of error to review the judgment, unless the fine was paid under protest and under duress. In the opinion it is said that the writ of error may be retained, where the fine has been paid under protest, to prevent imprisonment under a void sentence, or under other circumstances amounting to duress. In the same case the Court further held that threatened imprisonment under a judgment alleged to be erroneous cannot constitute duress. This holding is unsound in that it fails to distinguish between an act impelled by imprisonment which is concededly *legal,* and an act impelled by imprisonment under a judgment which the party claims is voidable because of error. In such a case, to say that a legal imprisonment is not duress, begs the question whether the imprisonment is just or erroneous.

In People *v.* Marks,[3] the Court held that the defendant should be allowed to prosecute his appeal, although his sentence had been served, saying:

> "I do not agree with the learned counsel that the question is purely academic. I am of opinion that, if the defendant had been unjustly compelled to pay a fine, his money should be returned to him. Of far more importance, however, is the defendant's right to be relieved of the odium and disgrace of a conviction. To a citizen of good reputation, this is of more serious consequence, and the pecuniary damage he has sustained is of trifling import."

In the opinion by Somerville, J., in the Alabama Case,[4] it is happily said:

> "The assumption in State *v.* Westfall (37 Iowa 575), and other cases, that a convicted defendant, who is ordered to be committed to jail, unless the fine and costs be paid or secured, and, under that threat from a *valid judgment,* pays the penalty assessed, does so *voluntarily,* is but a grim form

---

[2] White *v.* City of Tifton, 1 Ga. App. 569, 57 S. E. 1038.
[3] 120 N. Y. Supp. 1106.
[4] Johnson *v.* State, 172 Ala. 424, 430, 55 South. 226.

> of jesting, and utterly at war with the generally accepted notion of the meaning of that term."

In cases where the punishment is imprisonment or hard labor, etc., the interesting question has arisen whether the defendant's appeal can be entertained and decided after he has served the sentence. Does the question of guilt or innocence become "moot," after the judgment has been fully performed? The view best sustained by authority is that the defendant has an important interest in pursuing his appeal to a final determination of the question of guilt.

In Barthelemy *v.* People,[5] where the defendant had served his sentence, the Court refused to dismiss the writ of error, saying (per Cowen, J.) that it would be retained and decided "even in case where we must see that no restitution could follow the reversal as a legal consequence, and no costs be recovered. An erroneous judgment against him is an injury *per se*, from which the law will intend that he is or will be damnified by its continuing against him unreversed."

In Roby *v.* State,[6] it was held that where a person has prosecuted a writ of error while serving his sentence, the fact that his sentence expired before the decision of his case does not affect his right to a reversal of the judgment, if erroneous. In the opinion, the Court said:

> "The mere payment of a judgment in a civil cause does not operate to bar or waive the right to appeal therefrom, and for stronger reasons the compulsory working out of a judgment in a criminal case does not debar a man from obtaining a reversal of an erroneous conviction, and thus removing the stigma which wrongly rests on his name and reputation."

Mr. Justice Holmes, now of the Supreme Court of the United States, had occasion to speak for the Supreme Court of Massachusetts upon this question. In Commonwealth *v.* Flechner,[7] he held that the appeal could be continued after completion of the

---

[5] 2 Hill (N. Y.) 248; followed in Page *v.* People, 99 Ill. 418.

[6] 96 Wis. 667, 71 N. W. 1046.

[7] 167 Mass. 13, 44 N. E. 1053.

sentence, saying: "We should be slow to suppose that the legislature meant to take away the right to undo the disgrace and legal discredit of a conviction merely because a wrongly convicted person has paid his fine or served his term."

It should be noted that the statutory provisions for suspending or superseding a judgment, pending an appeal from it, may have a controlling effect in determining whether a party's compliance is voluntary. Thus in a Kansas case,[8] which holds that payment of a fine was a waiver of the right of appeal, it is said: "Under the statute the judgment of conviction which was entered against him would have been stayed by the mere taking of an appeal, without any order of the Court or the giving of a bond."

Though this decision has been criticised, it is manifestly correct, for the reason quoted from the opinion. It also suggests a remedy for all the differences of opinion and cases of injustice afflicting this part of the body of the law. Instead of clumsy and technical supersedeas laws, and what not, a general provision simply providing for an automatic suspension of sentence while an appeal is pending, would seem to meet the ends of justice in giving full effect to the right of appeal.

A distinction exists between imprisonment as a punishment after conviction, and imprisonment as incidental to a civil or criminal proceeding. It is in the first alone that the right of appeal may exist after the imprisonment has ended.

Thus where a defendant in a possessory warrant had been imprisoned and took out a *habeas corpus* writ on the hearing of which the trial court refused to release him, he appealed and while his appeal was pending, the plaintiff dismissed the warrant and the defendant's bond was discharged, it was held that the question of the legality of the imprisonment was a moot question, and the writ of error was dismissed.[9]

So where a person accused of crime was imprisoned and a *habeas corpus* was sued out claiming that his detention was illegal, on which the trial court refused to release him, and he ap-

[8] State *v.* Conkling, *supra.*

[9] Turner *v.* Hill, 17 Ga. App. 257, 86 S. E. 460.

pealed, and afterwards he was indicted, gave bond and was released, it was held that the writ of error should be dismissed.[10] This decision does not conflict with others cited, because the writ of error here did not involve the question of guilt or innocence of any offense.

The treatment accorded such questions is well expressed in a Georgia case, already cited,[11] which held that in no case will the Court of Appeals undertake to pass upon questions presented by a bill of exceptions when the adjudication of them, even though favorable to the plaintiff in error, could not result in any practical benefit to him; and in such a case the writ of error will be dismissed. Moot questions are not for solution by Courts. In the opinion by Russell, C. J., it is said:

> "The unremitting labor involved in deciding cases in which substantial rights of parties litigant are involved is amply sufficient to employ our entire time and to consume our surplus energies. However accommodating might be our disposition, the labor involved in those cases in which there is necessity for decision paralyzes the impulse to indulge in learned disquisition upon mere abstractions."

As another illustration of what is not a moot question, and of what is not a waiver, there is a case in which a sheriff was convicted of misconduct and removed from office. He appealed, and while his appeal was pending, resigned from the office. It was decided that he could still prosecute his appeal for the sake of removing the odium of his conviction.[12]

A remarkable decision was that in an English case.[13] A judgment of outlawry had been pronounced on a baronet in the year 1729, and on a writ of error brought by his heir the judgment was held void and reversed in 1844, after the lapse of 116 years. From the notes to the case, it appears that there were no property rights involved, but only the title of baronet, and the heir

---

[10] Carter *v.* Gabrels, 136 Ga. 177, 71 S. E. 3.

[11] Turner *v.* Hill, *supra.* References to decisions as to what are "moot" questions may be found in 4 CORPUS JURIS, §§ 2383-2389, 3110, 3129.

[12] Moore *v.* State (Miss.), 45 South. 866.

[13] Tynte *v.* Queen, 7 Ad. & El. (N. S.), 53 E. C. L. 216.

was allowed to prosecute the writ of error, to clear his title to the baronetcy, the forfeiture of which had resulted from the conviction of his ancestor.

The authorities strongly favor the doctrine that a person who has been convicted of an offense may prosecute his appeal from the conviction to a final decision, if he has not voluntarily acquiesced in the judgment, although he may have undergone the punishment. He has a substantial interest and a legal right to clear his name, if he can, and remove the stigma from his reputation.

Archibald H. Davis.

ATLANTA, GA.